

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)

Implementation of the Local Competition)
Provisions in the Telecommunications Act)
of 1996)

CC Docket No. 96-98

Interconnection between Local Exchange Carriers)
and Commercial Mobile Radio Service Providers)

COMMENTS

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COMMENTS

BellSouth Corporation and BellSouth Telecommunications, Inc. ("BellSouth") hereby submit their comments on the Further Notice of Proposed Rulemaking in the above referenced proceeding.¹

I. INTRODUCTION AND SUMMARY OF POSITION

In the Third Order on Reconsideration, the Commission clarified that an incumbent local exchange carrier's ("ILEC") obligation to provide shared transport as an unbundled network element (UNE) to a requesting carrier includes providing access to the same transport facilities that an ILEC uses to carry its own traffic and concluded that shared transport included transport between ILEC switches.² The Commission further concluded that the provision of shared transport necessitated that requesting carriers also be permitted to use the ILEC's routing tables

¹ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Interconnection between Local Exchange Carriers and Commercial Service Providers*, CC Dkt. No. 96-98, Third Order on Reconsideration and Further Notice of Proposed Rulemaking FCC 97-295, released August 18, 1997 ("Notice").

² See, e.g., Third Order on Reconsideration at ¶ 2.

that are resident in and part of the ILEC's switches.³ The Commission also clarified that a requesting carrier that obtained shared transport could use such transport to originate and terminate exchange access traffic to customers to whom the requesting carrier also provided local exchange service.⁴

The issue presented in the *Notice* is whether the Commission's rules should be further amended to permit a requesting carrier to obtain and use shared and dedicated transport unbundled network elements ("UNEs") in conjunction with unbundled switching to originate and terminate interexchange toll traffic where the requesting carrier does not provide the local exchange service of the customer?⁵ Simply put, the question being considered in this proceeding is whether IXC's should be permitted to arbitrage between UNEs and exchange access? The clear and incontrovertible answer is no.

As explained more fully below, it is inappropriate to decouple the use of UNEs from the provision of local exchange service. First and foremost, if the Commission were to disassociate the use of shared transport from the provision of local exchange service, such a determination would be totally inconsistent with the Commission's findings regarding the characteristics of UNEs. Beginning with the Local Competition Order⁶ and consistently through the Third Order on Reconsideration, the Commission has found that a UNE encompasses all of the capabilities of

³ *Id.*

⁴ *Id.* The validity of the Commission's determinations in the Third Order on Reconsideration are being addressed elsewhere and, hence, will not be discussed in these comments.

⁵ *Notice* ¶ 61.

⁶ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Interconnection between Local Exchange Carriers and Commercial Service Providers, First Report and Order*, 11 FCC Rcd 15499 (1996) ("Local Competition Order"), *rev'd in part, Iowa Utilities Board et al. v. FCC*, 120 F.3d 753 (8th Cir. 1997).

the UNE and that the purchaser of the UNE has the exclusive use of the UNE. A rule that would permit IXC's to obtain UNEs without also being the local service provider would be so fundamentally at odds with the Commission's prior determinations that such rule and the Commission's *Local Competition Order* and reconsideration orders could not coexist.

The IXC's would not be assuming any of the risk associated UNEs because they would not have exclusive use. The IXC, under a claim of obtaining UNEs, would merely be enjoying a risk free use of the LEC's facilities. There would be no interconnection point between the local exchange network and the interexchange network. The IXC would simply have access to the LEC's switch to connect to the LEC's end user customer, notwithstanding that the LEC, as the local service provider, continues to bear the risk of the switching investment and the interconnecting transport facilities. The absence of a physical demarcation point between the local and interexchange network serves to illustrate that the IXC would be obtaining nothing more than exchange access service, but at substantially reduced prices.

There is nothing in the Communications Act that compels the Commission to adopt a rule that reverses existing Commission decisions. To the contrary, sound administrative policy would eschew embarking on a course that is contrary to existing policy. The Commission's existing policy has only been in place for a year and the circumstances have not changed to any significant degree that could explain and justify a new direction by the Commission.

Apart from the fact that permitting IXC's to substitute UNEs for exchange access reverses existing Commission policy, such a determination would carry with it negative regulatory, financial and operational consequences. An immediate and obvious consequence is that the Commission would be enabling arbitrage between UNEs and exchange access. The effect is

clear--exchange access transport would disappear. Thus, the Commission would abandon its jurisdiction over interstate transport, shifting it instead to the state commissions through their oversight of non-jurisdictional UNEs. The eradication of transport as an access service has pervasive financial consequences. BellSouth could suffer a net revenue loss of nearly 300 million if all transport services are converted to UNEs. Given that the Commission is also considering that these UNEs can be used in conjunction with unbundled switching, the net revenue losses could increase considerably.

Permitting IXC's to use unbundled network elements will not further the Commission's competitive goals. It is not merely ILECs that would be adversely affected. Since 1991, the Commission has been promoting competition for exchange access, particularly switched and special access transport. Numerous entities have invested substantial sums in alternative transport networks to compete with the LECs for the provision of exchange access services. If the Commission permits IXC's to substitute UNEs for exchange access services, the very market that alternative access providers were enticed to enter will evaporate.

Likewise, local competition is not enhanced. Local competitors that were planning to develop networks through UNEs would, like the ILEC, now be subject to bypass. The exclusive use of the UNEs that local competitors were led to believe they obtained would be illusory.

Other than providing a pecuniary benefit to IXC's, there is no reason to create a circumstance that permits IXC's to arbitrage between UNEs and exchange access. The adverse competitive effects alone provide a substantial reason for the Commission not to establish a new rule. These effects, coupled with the fact that the new rule would effectively nullify the

Commission's existing local competition rules, compel the Commission to reject adopting this new rule.

II. THERE ARE COMPELLING REASONS FOR THE COMMISSION NOT TO PERMIT IXCS TO SUBSTITUTE UNES FOR EXCHANGE ACCESS

A. To Permit IXCs To Substitute UNEs For Exchange Access Is Contrary To The Commission's Local Competition Orders

In a brief two paragraphs, the *Notice* sets forth a concept that, if adopted, would eviscerate the Commission's core determinations in its local competition orders regarding UNEs. If the Commission were to permit IXCs to use transport UNEs in conjunction with local switching to be substituted for exchange access services, the Commission would, in effect, dispense with the essential characteristic that it attributed to UNEs--that the purchaser obtained exclusive use of the UNE.

Under existing rules, a requesting carrier can only use shared transport UNEs in conjunction with a local switching UNE if the carrier provides local service to the end user customer. The rule stems from the fact that in its *Local Competition Order*, the Commission determined that the purchaser of unbundled switching received the ability to connect lines and trunks to the local switch. In the Commission's view, anything less than that full switching functionality would contravene Section 251(c)(3).⁷

The Commission confirmed its determination in its *First Reconsideration Order*.⁸ The Commission explained:

⁷ See *Local Competition Order* ¶¶ 412, 422-23.

⁸ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98 and 95-185, FCC 96-394, Order on Reconsideration, released September 27, 1997. ("*First Reconsideration Order*")

a carrier that purchases the unbundled local switching element to serve an end user effectively obtains the exclusive right to provide all features, functions, and capabilities of the switch, including switching for exchange access and local exchange service.⁹

The Commission cannot now simply find that an IXC can use shared/dedicated transport UNEs in conjunction with unbundled local switching to deliver or receive exchange access traffic without gutting the existing rules.

If an IXC were permitted to use UNEs without regard to whether it is also providing local service, such use would be inconsistent with the Commission's determination that a purchaser of a UNE obtains the full capability of the unbundled element, including providing local service and exchange access. In this particular circumstance no carrier would obtain the full functionality of the unbundled switch. Thus, the IXC, for example, could use shared transport and unbundled switching to replace exchange access services without regard to local service. Assuming that the Commission would intend that a competitive LEC (CLEC) could obtain the same UNEs, the CLEC would not be able to provide exchange access service to that IXC even though under the Commission's rules that functionality is inherent in the UNE it has purchased.¹⁰ By decoupling the provision of local service from the purchase of a UNE, the Commission decouples the risk that is supposed to be associated with the purchase of a UNE, at least for the IXC.¹¹

The IXC, under a claim of obtaining UNEs, would merely be enjoying the risk free use of the LEC's facilities. There would be no interconnection point between the local exchange

⁹ *Id.* at ¶ 11.

¹⁰ If a LEC could not obtain access to the same unbundled elements, then the end user would not be able to obtain local service.

¹¹ At the same time the Commission potentially increases the risk for CLECs because the Commission provides IXCs with an opportunity to bypass the CLECs' services.

network and interexchange network. The UNEs would provide IXC's access to the LEC's switch to connect to the LEC's end user customer, notwithstanding that the LEC continues to bear the risk of the network investment. This absence of a physical demarcation point between the local and interexchange network, serves to illustrate that the IXC would, in fact, be obtaining nothing more than exchange access service, but at substantially reduced prices.

The distinction between UNEs and the provision of exchange access service is at the heart of the Commission's local competition rules. The Court of Appeals for the Eighth Circuit, in reviewing the Commission's *Local Competition* Order, recognized this distinction:

Interconnection and unbundled access are distinct from exchange access because interconnection and unbundled access provide a requesting carrier with a direct hookup to and extensive use of an incumbent LEC's local network that enables a requesting carrier to provide local exchange services, while exchange access is a service that LECs offer to interexchange carriers without providing the interexchange carriers with such direct and pervasive access to the LECs' networks and without enabling the IXCs to provide local telephone service themselves through the use of the LECs' networks and without enabling the IXCs to provide local telephone service themselves through the use of the LECs' networks.¹²

The Court's discussion merely mirrors the Commission's own assessment that when IXCs purchase unbundled elements from incumbents, they are not purchasing exchange access services but, instead, are obtaining a totally different product--the right to exclusive access or use of an entire element. The distinction, then, is not merely a matter of semantics, but core to the local competition framework the Commission has established. What is missing at this time is the reason for the Commission to dismantle that framework. Yet, such would be the result if the Commission were to permit IXCs to substitute UNEs for exchange access.

¹² *Iowa Utilities Board et. al. v. FCC*, 120 F.3d 753 (8th Cir. 1997).

**B. To Permit IXC's To Substitute Shared Transport For Exchange Access
Would Be Inconsistent With The Third Order On Reconsideration**

In the *Third Order on Reconsideration*, the Commission expounded upon the basis for requiring ILECs to provide shared transport. The Commission rejected Ameritech and BellSouth arguments that shared transport was nothing more than a request for a bundled service. The Commission recognized that, as it defined shared transport, the UNE could not be disassociated from unbundled switching and, therefore, concluded that under its rules the LECs could not disassociate the shared transport and switching UNEs.

The Commission went on at length that there was no basis for concluding that each network element must be functionally independent of other network elements.¹³ Because of the interdependency of shared transport and switching, the requesting carrier had to obtain all the features of the switch, including those essential to providing local service. The Third Order on Reconsideration confirmed the Commission's view that the risk associated with purchasing UNEs was tied to providing local service.¹⁴ If the Commission in this proceeding determines that an IXC can use shared transport merely as a replacement of its exchange access service, the rationale which the Commission used to distinguish between UNEs and bundled services evaporates and with it any basis for requiring ILECs to provide shared transport as a UNE.

¹³ *Third Report and Order* at ¶ 42.

¹⁴ *Id.* at 47.

C. Nothing In the Communications Act Compels That IXC's Be Permitted To Substitute UNEs For Exchange Access

Section 251(c)(3) of the Communications Act requires ILECs to provide access to UNEs to a requesting carrier for that carrier's provision of a telecommunications service.¹⁵ The Act defines a telecommunications service as "the offering of telecommunications for a fee directly to the public...."¹⁶ Under the rule the Commission is considering in this proceeding, the IXC's would not be obtaining UNEs to offer telecommunications to the public. Instead, the UNEs would be used to replace an exchange access service that the IXC currently obtains. Thus, it cannot be argued that ILECs have a duty to provide IXC's access to UNEs under Section 251(c)(3).

Similarly, Section 251(d)(2)(B) directs the Commission to consider, at a minimum, whether failure to provide access to a network element would impair a telecommunications carrier's ability to provide the telecommunications service it seeks to offer.¹⁷ Since the purpose of the IXC's' access to UNEs would not be to offer a service but instead to displace a service it obtains, the IXC's could not be considered as being impaired from offering a service to the public if they were not permitted access to UNEs. Thus, there is no basis under Section 251(d) to direct ILECs to provide IXC's access to shared or dedicated transport in conjunction with unbundled switching absent an IXC also providing the end user local exchange service.

¹⁵ 47 U.S.C. § 251(c)(3).

¹⁶ 47 U.S.C. § 153(46).

¹⁷ 47 U.S.C. § 251(d)(2)(B)

D. Permitting IXC's To Substitute UNEs For Exchange Access Would Engender A Substantial Jurisdictional Shift To The States And Cause LECs To Incur A Significant Net Revenue Loss

If the Commission were to permit IXC's to substitute UNEs for the exchange access services they currently obtain, the effect would be to jurisdictionally shift the responsibility for a significant portion of the ILEC's interstate traffic from the Commission to the states by virtue of the states paramount authority over non-jurisdictional unbundled elements. Such a jurisdictional shift has significant financial implications. Interstate exchange access contributes to the recovery of joint and common costs of the ILEC. The recovery scheme reflects a long history of regulatory policies that have supported the intrastate jurisdiction because of the way in which costs recovery responsibilities have been allocated between jurisdictions through the jurisdictional separations process. Even the Commission's universal service fund fails to address the historical and continuing effects of the jurisdictional separations process.

The Commission could, conceivably, in this proceeding adopt a rule that would have the effect of eliminating a substantial portion of interstate access. This consequence stems from the fact that state commissions may set the prices of UNEs at levels which do not make the same contribution to the recovery of joint and common costs that is currently made by exchange access. In part, the pricing determinations that the states will make regarding UNEs will reflect an assumption that exchange access would continue to exist and provide a significant contribution to the recovery of joint and common costs. Should the Commission in this proceeding permit IXC's to substitute UNEs for exchange access, the price differences between UNEs and exchange access that are likely to occur would virtually guarantee that exchange access transport would disappear.

No state commission has contemplated that the Commission would adopt a rule that would virtually eliminate all of exchange access transport. Nor is it clear, given the brevity of the *Notice*, that the Commission appreciates the financial impact if it adopts a rule that substantially does away with exchange access transport. For example, based on an average of UNE costs that BellSouth has developed for ongoing state commission proceedings, BellSouth could experience a net revenue loss of nearly 300 million if all dedicated and common exchange access transport became UNEs. The *Notice*, however, also suggests that the unbundle transport elements could be used with unbundled switching. Such a step could result in a significantly larger net revenue loss.

Even if the Commission were to believe that a new rule should be adopted, which it should not, the Commission must consider the financial impact and take steps to mitigate it. At a minimum it must review jurisdictional separations rules to make sure that costs are not stranded in the interstate jurisdiction without an adequate interstate means for recovering them. Further, the Commission must provide state commissions with an adequate transition period so that the state commissions can take into account the fact that a substantial source of contribution to the recovery of joint and common costs is being eliminated and adjust, as appropriate, UNE prices.

E. The Commission's Competitive Goals Would Not Be Served By Adoption Of A New Rule

The substitution of UNEs for exchange access has negative competitive consequences as well. First, competitive access providers (CAPs), who have been encouraged to compete on a facilities basis with the ILECs for exchange access transport, will find that IXC's will be able to bypass not only the ILECs but their competitive networks. For six years, CAPs have invested in building alternative transport networks and competing with ILECs for the provision of exchange access transport. In building these networks, the CAPs assumed the risk that they might be

unsuccessful in the marketplace. No CAP, however, could have anticipated that the Commission would eliminate the market.

Nor would this new rule advance local competition. CLECs that are putting networks together using UNEs would lose an important revenue source, exchange access. IXC's would not have to obtain exchange access services from the CLEC because the CLEC would not have exclusive use of the unbundled elements that they have purchased. The chilling impact on competition goes beyond the fact that CLECs could be bypassed by IXC's. More insidious would be the fact that the Commission was willing to change the competitive ground rules for no apparent reason. Competition cannot thrive in an environment of such regulatory uncertainty.

A primary purpose of the Telecommunications Act of 1996 was to promote local competition. It would be unfortunate that in implementing the Act, the Commission adopted a policy that was to the financial advantage of the IXC's but stymied local competition.

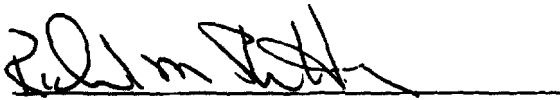
III. CONCLUSION

The brevity of the *Notice* stands in stark contrast to the significance of impact should the Commission adopt a rule that permits IXC's to substitute UNEs for exchange access. Such a rule

would undermine the framework that the Commission has established in its local competition orders. As these comments show, the Commission would be mistaken if it adopted this new rule.

Respectfully submitted,

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